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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 173

JACK WALKER,

Petitioner,

vs.

JAMES A. JOHNSTON, WARDEN, UNITED STATES PENITENTIARY, ALCATRAZ, CALIFORNIA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

CHARLES E. WYZANSKI, JR.,
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State v. *Moore*, 61 Kan. 732, 60 Pac. 748 29
State v. *Murphy*, 87 N. J. Law 515, 94 Atl. 640 29
State ex rel Tucker v. *Davis*, 9 Okla. Crim. Rep. 94 29
Storti v. *Massachusetts*, 183 U. S. 138 39
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Miscellaneous:

Adams, *Works of John Adams* (1851) Vol. III, p. 220 24
American Law Institute, *Code of Criminal Procedure*; Official Draft, March 16, 1931, Sec. 203, pp. 630–634 ..... 19, 28
1 Annals of Congress 26, 27
Annual Report of the Director of the Administrative Office of the United States Courts, September 16, 1940, pp. 78–86 19
Blackstone's *Commentaries*, Book IV, pp. 355, 356 ..... 9, 22
Brief of respondent, Appendix 4, in *Johnson* v. *Zerbst*, October Term, 1937, No. 699 30
Butterworth's *Twentieth Century Statutes*, Vol. 27, 28–31 (1930); Vol. 28, pp. 117–118 (1931) 30
City of Paris, Cahier du Clergé, I, 159 26
Criminal Justice in Cleveland (1922), p. 311 30
Debates and Proceedings in the Convention of the Commonwealth of Massachusetts held in the year 1788 (Boston 1856), pp. 80, 84, 87–92 21
Elliot's *Debates:*
Vol. II 21, 23
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Esmein, A., *A History of Continental Criminal Procedure* (1913), p. 398 26
First Report of the Commission on Legal Aid for the Poor (1926) CMD 2638 30
Final Report of the Commission on Legal Aid for the Poor (1928) CMD 3016 30
Frankfurter, Felix, *Law and Politics*, pp. 189, 193 30
Halsbury's Laws of England (2d ed.) Vol. IX 22, 33, 36, 41
Holdsworth, *History of English Law:*
Vol. IX 04
Vol. X 34

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1 House Journal: 26, 27
Howard, P., *Criminal Justice in England* (1931), pp. 346–349 30
Howland, K. M., *The Life of George Mason:*
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Jefferson, *Writings* (ed. H. A. Washington, Philadelphia 1871), Vol. III, pp. 69, 72, 96 25
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Madison, *Writings* (Philadelphia 1865) Vol. 1, p. 492 26
McMaster, J. B. and F. D. Stone, *Pennsylvania and the Federal Convention* (1888) 21, 23
Memoir of Theophilus Parsons, by his son, Theophilus Parsons (Boston 1859), pp. 70, 79 21
17 Minn. L. Rev. 415 (1933) Note 29
Moley, R., *Our Criminal Courts* (1930), p. 67 30
National Commission on Law Observance and Enforcement, *Report on Lawlessness in Law Enforcement*, Vol. IV 30
Oxford English Dictionary:
Vol. I 24, 25, 27
Vol. III 27
Vol. IX 39
Report of the Judicial Conference, October Session, 1940, p. 16 31
1 Senate Journal 26
Smith, R. H., *Justice and The Poor* (Carnegie Foundation for the Advancement of Teaching, 1919), pp. 111–112 30
Vannes, Cahier du Tiers, III, 161–162 26
19 Va. L. Rev. 293 (1933) Note 29
Walker, J. B., *A History of the New Hampshire Convention* (Boston 1888), p. 50 21
Warren, C., *The Making of The Constitution*, p. 510 21

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 30-34) is reported in 109 F. (2d) 436.

Jurisdiction.

The judgment of the Circuit Court of Appeals for the Ninth Circuit was entered February 6, 1940 (R. 34-35). A petition for rehearing was denied March 7, 1940 (R. 35).

May 14, 1940, Mr. Justice Douglas of this Court extended the time within which to apply for a writ of certiorari for a period of thirty days from June 7, 1940 (R. 35). Petition for writ of certiorari was filed June 22, 1940 (R. 36) and was granted October 28, 1940 (R. 35). The jurisdiction of this Court rests upon Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Questions Presented.

The petitioner claims that he is imprisoned in violation of the Fifth and Sixth Amendments to the United States Constitution. He is now committed to the respondent's custody pursuant to a sentence of a United States District Court for a crime of robbery, of which he alleges he is innocent. His application states that the sentence was pronounced under the following circumstances.

He first learned of the charge only two days before arraignment and while he was in custody in a city where he had no acquaintances. He requested a continuance so he could communicate with friends and get money to retain counsel. He requested access to his co-defendant or his co-defendant's counsel. These requests were refused. The District Attorney threatened him with twice as heavy a sentence unless he pleaded guilty. He did not know, and was not told by either the District Attorney or the court, that he was entitled to have counsel assigned to assist him without cost. Without competently waiving his right to counsel, he pleaded guilty and was thereupon convicted and sentenced to the penitentiary for twelve years.

On these allegations the following questions are presented:

1. Whether the petitioner's application for the issuance of a writ of *habeas corpus* state a *prima facie* case of im-

prisonment of the petitioner in violation of the Fifth and Sixth Amendments to the United States Constitution.

2. If the petitioner's application states a *prima facie* case, whether the District Court erred in not issuing a writ of *habeas corpus* commanding the prisoner to be brought before the court and erred in not permitting a full, expeditious inquiry wherein the petitioner would have reasonable opportunity to present testimony in support of the application by usual methods such as examining and cross-examining witnesses and offering depositions.

Constitutional and Statutory Provisions Involved.

The Fifth Amendment to the United States Constitution provides in part:

> "No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *"

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

R. S. § 751 U. S. C. Title 28 § 451 provides:

> "The Supreme Court and the district courts shall have power to issue writs of *habeas corpus*."

R. S. § 754 U. S. C. Title 28 § 454 provides:

> "Application for writ of *habeas corpus* shall be made to the court, or justice, or judge authorized to

issue the same, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

R. S. § 755 U. S. C. Title 28 § 455 provides:

"The court, or justice, or judge to whom such application is made shall forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto. The writ shall be directed to the person in whose custody the party is detained."

R. S. § 758 U. S. C. Title 28 § 458 provides:

"The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

R. S. § 760 U. S. C. Title 28 § 460 provides:

"The petitioner or the party imprisoned or restrained may deny any of the facts set forth in the return, or may allege any other facts that may be material in the case. Said denials or allegations shall be under oath. The return and all suggestions made against it may be amended, by leave of the court, or justice, or judge, before or after the same are filed, so that thereby the material facts may be ascertained."

R. S. § 761 U. S. C. Title 28 § 461 provides:

"The court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."

Statement of Facts.

Petitioner filed March 28, 1939 a petition for a writ of habeas corpus in the United States District Court for the

Northern District of California (R. 2-4). The petitioner alleged that he was imprisoned by respondent in the United State Penitentiary at Alcatraz pursuant to a sentence and commitment of the United States District Court for the Northern District of Texas; and that his imprisonment was unlawful because in the court where he was convicted and sentenced "he was deprived of his liberty without having the assistance of counsel, because he did not waive his lawful right for counsel * * * [and] * * *, because the trial Court did not ask the petitioner herein if he wanted counsel, or instruct him that he was entitled to counsel" (R. 3). To the petition were annexed (A) a copy of the indictment of the petitioner by the Grand Jury of the United States District Court for the Northern District of Texas (R. 7-9); (B) a copy of the record of the petitioner's trial and conviction (R. 9-10); (C) a copy of the record of the petitioner's sentence (R. 10-11); (D) a copy of the record of the petitioner's commitment (R. 11-12); and (E) the clerk's certificate that the foregoing were true copies.

March 28, 1939 District Judge Roche issued an order to respondent, the Warden of Alcatraz, directing him to show cause on April 24, 1939 why a writ of habeas corpus should not be issued (R. 5).

May 15, 1939 the Warden answered (R. 5-6). The answer incorporates the same court records annexed to the petition and also incorporates three affidavits executed respectively by Clyde O. Eastus, United States Attorney for the Northern District of Texas (R. 17-18); his assistant, Joe H. Jones (R. 18-20); and Elmer J. Reed, who in 1936 was Deputy United States Marshal for the Northern District of Texas (R. 20-21). The answer and affidavits in effect stated that after the District Attorney had informed the petitioner that he would get a lighter sentence if he pleaded guilty (R. 17, 19), and after the petitioner had said he would plead guilty (R. 17, 19, 20), the District Attorney

asked petitioner "if he *had*[1] a lawyer and he said he did not want an attorney" (R. 17, 19).

June 27, 1939 the petitioner filed a verified traverse under the style of an "answer of petitioner to return to order to show cause" (R. 21-24). The traverse denied the allegations of the answer and asserted that the petitioner did not know of his right to the assistance of counsel and did not waive his right to counsel in the Texas proceedings (R. 23-24) and that he was not guilty of the crime with which he was charged (R. 24, ¶ VI). The traverse also includes allegations to the following effect.

Petitioner first learned that he had been indicted for a bank robbery in violation of U. S. C. Ti. 12 § 588(b) when he was removed, in the custody of the United States Deputy Marshal, Elmer J. Reed, on Saturday, April 26, 1936, from Santa Fe, New Mexico, to the place of trial at San Angelo, Texas (R. 22).

On arriving in San Angelo, Saturday, April 26, 1936, the petitioner, in the presence of Deputy Marshal Reed, was under questioning by the United States District Attorney, Clyde O. Eastus, and by his assistant, Joe H. Jones (R. 22). The United States District Attorney asked the petitioner to plead guilty; but the petitioner refused to plead guilty or to talk further to the United States District Attorney (R. 22).

Two days later, just before the trial, the United States District Attorney again came to the petitioner. The petitioner requested the United States District Attorney "to have said trial continued so that petitioner could communicate with his relatives and try to obtain money to

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[1] Note that District Attorney Eastus (R. 17, 6 to 10 lines from the bottom of the page), his assistant Jones (R. 19, lines 5-7) and former Deputy Marshal Reed (R. 20) make it clear by the order of their statements that they never mentioned to the petitioner any question of counsel until he said he was guilty; and then they say merely that they asked him if he "*had* a lawyer," not if he *wanted* one.

enable him to hire an attorney for petitioner's defense, but that said affiant Eastus told petitioner that this was not possible and told petitioner to plead guilty to said charges, warning him that otherwise petitioner would be sentenced to double the term that he would receive if he pleaded guilty; that at no time herein mentioned did petitioner have any relatives, friends, or acquaintances, in or near San Angelo, Texas, other than petitioner's co-defendant, Charlie White; that at said last mentioned time petitioner asked affiant if petitioner could talk with his co-defendant, Charlie White, or the latter's attorney, but this request was also refused; that thereupon and because of said warning and in fear of a prison term of more than twelve years petitioner told said affiant that he would plead guilty to said charges'' (R. 22-23).

On the same Monday the petitioner was arraigned and pleaded guilty (R. 9, 17). ''No one, at any time during said proceedings, asked petitioner if he desired the assistance of counsel for his defense, nor did anyone offer to procure the same for petitioner; that at all of said times petitioner was without any money to pay for the assistance of counsel and believed that he could not obtain the assistance of counsel without money to pay therefor; that petitioner attended school through the fifth grade and thereafter petitioner has had no schooling or education of any kind whatsoever; that petitioner was at all of the time herein mentioned entirely unversed in the law and was unable and unqualified to represent or act for himself in said proceedings; that at no time during said proceedings was petitioner asked to waive his right to the assistance of counsel for his defense, nor did he by word, act or in any manner whatsoever state or indicate that he waived or intended to waive such right'' (R. 23-24).

With the foregoing conflict between the petitioner and respondent on issues of fact, the application for a writ of

habeas corpus came on for hearing before District Judge Roche, July 10, 1939 (R. 25). Despite the fact that the petitioner had prayed to be brought before the court (R. 4), he was not present. So far as appears, neither the petitioner nor his counsel was given (or waived) the opportunity to present testimony or examine and cross-examine possible witnesses, including those whose affidavits had been presented and others (like District Judge Atwell, see Petition for Certiorari, p. 13) who had refused affidavits. Solely on the basis of the papers before him and argument by the attorneys, and without making any finding of fact, District Judge Roche dismissed the petition for the writ of habeas corpus (R. 25-26).

July 27, 1939 petitioner appealed to the Circuit Court of Appeals for the Ninth Circuit (R. 28). That court affirmed the order of the District Court, February 6, 1940 (R. 34-35) and denied a petition for rehearing (R. 35).

Summary of Argument.

We make two points in this case. First, we say that the application for the writ of habeas corpus is good on its face. Next, we say that since the application is *prima facie* good, and the ultimate issue is one of fact, the District Court should have issued the writ, held a full judicial inquiry and specifically found the facts.

In contending that the application is good on its face we note its more dramatic allegations. The petitioner, who went only halfway through grammar school, first learned of the charge of bank robbery against him when on a Saturday he was removed by a Deputy United States Marshal from Santa Fe, New Mexico, to San Angelo, Texas, where he had no acquaintances. He was kept in a Texas gaol from Saturday through Monday. Saturday the United States District Attorney vainly tried to get him to plead guilty. Monday the petitioner asked and was refused a

continuance so he could reach friends and thus raise money for counsel. He also asked and was refused the right to talk with his co-defendant or his co-defendant's counsel. The District Attorney told him he would get twice as heavy a sentence if he did not plead guilty. Finally, in isolation and in fear the petitioner agreed to plead and did plead guilty that very day. Neither the prosecutors nor the Court told him he was entitled, without cost to him, to have counsel assigned to him, and he did not know he had that right.

We assert that the foregoing allegations state a case of imprisonment in violation of the Fifth and Six Amendments. Our reliance is based upon precedents in this Court, the historical background of the Sixth Amendment and modern views of the rights of indigent prisoners. The case at bar falls within *Johnson* v. *Zerbst,* 304 U. S. 458, and *Powell* v. *Alabama,* 287 U. S. 45, which decide that an indigent prisoner charged with a serious crime is entitled to the assignment of counsel without cost at every step of the proceedings to aid him in scrutinizing the indictment and in preparing the case as well as actually trying it. If the matter were not clear on judicial precedent, it would be clear on an historical basis. The Sixth Amendment was, as contemporary evidence indicates, designed to require in all serious criminal prosecutions the same right to the free assignment of counsel prior to arraignment which existed under the English Treason Act of 1695 (well known to the American colonists by its citation in Blackstone, *Commentaries,* Book IV, p. 356) and which was proposed to the French draftsmen of the Declaration of Rights (LaRochelle, *Cahier du Tiers,* III, 161). Furthermore, precedent and history aside, modern commentators regard assistance of counsel prior to arraignment as a prerequisite of due process. See National Commission on Law Observance and Enforcement (popularly known as the Wickersham Com-

mission), *Report on Lawlessness in Law Enforcement,* Vol. IV, pp. 5, 7, 281.

Since the application is good on its face, and the ultimate issue is one of fact, the District Court was required by statute to issue the writ. R. S. §§ 755, 758. This is the practice followed in the orders of this Court (*Ng Fung Ho* v. *White,* 259 U. S. 276, 285) as well as in most, though not all, of the inferior Federal courts, and in England. It is a practice which is demanded by considerations of fair play, and has not been found inconvenient or impractical in Atlanta where one of the largest United States penitentiaries is located. Moreover, convenience is not an appropriate consideration in a proceeding that places at stake liberty of the person.

When the petitioner is brought into court on the writ he is entitled to a full inquiry into the facts and to specific findings of fact by the trial court. *Moore* v. *Dempsey,* 261 U. S. 86, 92; *Johnson* v. *Zerbst,* 304 U. S. 458.

ARGUMENT.

I.

On its face petitioner's application to the District Court states a case of imprisonment of the petitioner in violation of the Fifth and Sixth Amendments to the United States Constitution.

A. Introductory.

The first issue presented is whether *on its face* petitioner's application states a case of unlawful imprisonment. It is our contention that petitioner's imprisonment is unlawful under both the Fifth and the Sixth Amendments to the United States Constitution. We rest that contention upon cases decided by this Court, upon the historical background of the Sixth Amendment, and upon a rule of criminal pro-

cedure so widely adopted by modern authorities that it "reflects if it does not establish, the inherent right to have counsel appointed, at least in cases like the present." *Powell* v. *Alabama*, 287 U. S. 45, 73.

Before presenting those important constitutional contentions, however, we note a minor point of pleading which seems to be raised by the record. The point is whether this Court will treat not merely the original petition (R. 2-5) but also the petitioner's traverse (R. 21-25) as jointly constituting "the application for a writ of habeas corpus." It is our view that such joint treatment is proper and, indeed, that any contrary course would merely delay justice.

B. The Petition and the Traverse Together Constitute "the Application for a Writ of Habeas Corpus."

We contend that "the application for a writ of habeas corpus" which was heard in the District Court and is under review here includes not merely the original petition (R. 2-5) but also the petitioner's traverse (R. 21-25).

The habeas corpus statutes provide for both of these documents. R. S. §§754, 760; U. S. C. Tit. 28 §§454, 460. The petitioner verified both [2] of these documents. And the District Court and the Circuit Court of Appeals treated both petition and traverse as one application (R. 25-26, 32), as was proper under Rule 8(f) of the Rules of Civil [3]

[2] In printing the traverse the verification was omitted. However, we have procured from the Deputy Clerk of the United States District Court for the Northern District of California an affidavit that although the traverse was executed by petitioner's then counsel, it was verified by petitioner himself. [We do not suggest that the traverse would be bad if verified by someone other than the petitioner. (Cf. *In re Neagle*, 135 U. S. 1, 3; *Collins* v. *Traeger*, 27 F. (2d) 842, 843 (C. C. A. 9); *United States ex rel. Bryant* v. *Houston*, 273 Fed. 915, 916 (C. C. A. 2); *The Case of the Hottentot Venus*, 13 East 195, 104 Eng. Rep. 344 (K. B. 1810).]

[3] Habeas corpus is a civil proceeding. *Ex parte Tom Tong*, 108 U. S. 556, 559-560. The Rules of Civil Procedure would seem to be applicable to this aspect of a habeas corpus proceeding. See Rule 81(a)(2).

Procedure (which requires that "all pleadings shall be so construed as to do substantial justice") and under the modern statute of jeofails, Act of February 26, 1919, c. 48, 40 Stat. 1181, Judicial Code § 269, U. S. C. Tit. 28 § 391. Cf. R. S. § 760; U. S. C. Tit. 28 § 460. Even "in days of technical pleading no informality was allowed to prevent the substantial question of the right of the subject to his liberty being heard and determined." [Halsbury, L. C., in *Cox* v. *Hakes*, 1890 A.C. 506, 514.] We cannot suppose that this Court will now look only at the petition and disregard the traverse, particularly in view of this Court's decisions in *Cuddy, Petitioner*, 131 U. S. 280, 283, and *In re Neagle*, 135 U. S. 1, 7, and the following additional considerations. No one raised this technical difference between the petition and the traverse in any inferior court. Cf. *Clements* v. *Moore*, 6 Wall. 299, 310-311. The prisoner had the aid of counsel only when he verified the traverse, not when he drew and verified the petition. And if the petition in the case at bar should be denied solely because it does not set forth the allegations contained in the traverse, nothing but delay would be achieved. Under the rule that a refusal to issue a writ of habeas corpus is not *res judicata* the prisoner could at once file a new petition embracing the allegations of the traverse. *Salinger* v. *Loisel*, 265 U. S. 224; *Wong Doo* v. *United States*, 265 U. S. 239; *Ex parte Royall*, 117 U. S. 241, 254. Cf. *Kessler* v. *Strecker*, 307 U. S. 22, 25.

C. A Summary of the Salient Facts Alleged in the Application.

If, then, both the petition and the traverse are regarded as one application, these are the salient facts alleged to show that the imprisonment is in violation of the Fifth

and Sixth Amendments[4] to the United States Constitution:

The petitioner, a man who went only halfway through primary school, was indicted for one of the most serious federal crimes—robbing a national bank—a crime of which he now alleges he was innocent (R. 24, ¶ VI). He first learned of that indictment Saturday, April 26, 1936, while he was in the custody of a Deputy United States Marshal who was taking him as his prisoner from Santa Fe, New Mexico, to San Angelo, Texas, a place where he had no acquaintances.

On his arrival in San Angelo that Saturday he was kept in prison and was subjected to questioning by the United States District Attorney in the presence of an Assistant United States Attorney and the Deputy Marshal. He remained steadfast in his statement that he was not guilty and intended to plead not guilty. The United States District Attorney went away leaving the man in gaol.

The following Monday the United States District Attorney returned. He told the petitioner he was going to be tried and if he did not plead guilty, he would get twice as heavy a sentence.

The petitioner asked for a delay so that he might communicate with his relatives to get funds to hire an attorney. The United States District Attorney said that was impossible.

The petitioner asked at least to talk with his co-defendant or his co-defendant's attorney. That request also was refused.

The petitioner, isolated, without counsel, in fear of excessive penalties, finally told the United States District Attorney he would plead guilty.

[4] The petition specifically invoked the Sixth Amendment (R. 3). The "Statement of Points upon which Appellant intends to rely" [not printed as part of the record in this Court] filed in the Circuit Court of Appeals September 2, 1939 pursuant to Rule 75(d) of the Rules of Civil Procedure, specifically invoked the Fifth Amendment.

The petitioner was forthwith brought into court and arraigned. He then pleaded guilty.

At no time did the District Attorney or the District Judge tell the petitioner that he was entitled not only to the assistance of counsel but also, if the petitioner were without funds, to the appointment of counsel by the Court without cost to him. Moreover, the petitioner did not know he had these rights and did not waive them.

We contend that an application alleging the foregoing facts states a plain case of a denial of the due process of law guaranteed by the Fifth Amendment to the United States Constitution and a denial of the assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. We support this contention by reference to decisions of this Court interpreting the two "due process" clauses and the "assistance of counsel" clause of the Constitution, by reference to the historical background of the Sixth Amendment and by reference to the better practice and better views with respect to the rights of indigent prisoners.

D. Controlling Decisions in This Court.

The petitioner's application states a case that falls squarely within the *ratio decedendi* of *Johnson* v. *Zerbst*, 304 U. S. 458, within the principles enunciated in *Powell* v. *Alabama*, 287 U. S. 45, and *Avery* v. *Alabama*, 308 U. S. 444, and within the *per curiam* disposition made in *Frame* v. *Hudspeth*, 309 U. S. 698.

Johnson v. *Zerbst* is, in our view, indistinguishable. There the prisoner, an enlisted man in the United States Marine Corps, was arrested November 21, 1934, together with another marine. Both were charged on that day with the crime of feloniously uttering, passing and possessing counterfeit Federal Reserve notes. They were represented

by counsel in preliminary hearings conducted by the United States Commissioner. Two months later, January 21, 1935, the marines were indicted. January 23rd they were arraigned in a United States court, and pleaded not guilty. At the arraignment they said that they had no lawyer, and—in response to an inquiry of the court—stated that they were ready for trial. They were then tried, convicted and sentenced, without assistance of counsel. (304 U. S. 460.)

Subsequently the prisoner petitioned for a writ of *habeas corpus*. In that *habeas corpus* proceeding the lower courts denied relief. On review, this Court held that the petitioner was entitled to be discharged if on remand the District Court should find that the petitioner had not competently waived his right to counsel. This Court held that "Since the Sixth Amendment constitutionally entitles one charged with crime to the assistance of counsel, compliance with this constitutional mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty * * * If the accused * * * is not represented by counsel and has not competently and intelligently waived his constitutional right, the Sixth Amendment stands as a jurisdictional bar to a valid conviction and sentence depriving him of his life or his liberty" (304 U. S. 467-468).

Writing for the Court, Mr. Justice Black quoted from *Powell* v. *Alabama*, 287 U. S. 45, 69, the statement of Mr. Justice Sutherland that if a layman is "charged with crime, he is incapable, generally, of determining for himself *whether the indictment is good or bad.* He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial *without a proper charge,* and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the

skill and knowledge adequately to prepare his defence, even though he have a perfect one. He requires the guiding hand of counsel *at every step* in the proceedings against him." (Italics added.)

In all significant respects the case at bar is like *Johnson's* case because each involves a petitioner who had no counsel at the arraignment and trial of a serious (but not a capital) offense; who was imprisoned in a strange city where he had no acquaintances; who was never informed by the prosecutor or the court that he was entitled without cost to him to have counsel appointed for him; and who did not competently waive the rights to assistance of counsel.

Indeed, in some respects, the case at bar is a much stronger case for the petitioner than was *Johnson's* case:

1. Here, the petitioner specifically requested and was refused a continuance so he could communicate with his relatives and try to obtain money to enable him to hire an attorney (R. 22). There, the petitioner, so far as appears, made no such request during the two months he was incarcerated and received no such refusal.

2. Here, the petitioner specifically requested and was refused a right to confer with a particular lawyer (R. 22). [Cf. *Levine* v. *Hudspeth,* 102 F. (2d) 691 (C. C. A. 10); *Howard* v. *Dowd,* 25 F. Supp. 844 (N. D. Ind.).] There, the petitioner actually conferred with counsel at the preliminary hearing before a United States Commissioner, but, so far as appears, never again asked to confer with him or any other specific lawyer.

3. Here, the petitioner learned of the general nature of the charge two *days* before he was arraigned. There, the petitioner learned of the general nature of the charge two *months* before he was arraigned.

4. Here, the petitioner was refused contact with his co-defendant. There, the petitioner had the advice and assistance of his co-defendant.

5. Here, the petitioner had gone only halfway through grammar school. There, the petitioner had sufficient intelligence to become a United States marine.

6. Here, the petitioner was induced to make what he now alleges is a false plea of guilty by threats of the District Attorney, who told him he would be given twice as heavy a penalty if he pleaded not guilty, stood trial and was convicted. There, no similar circumstances were alleged.

The Government may try to distinguish the case at bar from *Johnson's* case on two grounds: first, that here the petitioner had previously been in court and had been convicted of another crime, while there the petitioner had never previously been charged with any offense; or second, that here the petitioner pleaded guilty, while there the petitioner pleaded not guilty and stood trial. Neither ground of distinction is tenable.

There is no merit whatsoever to the first purported distinction. The fact that a man had been previously tried in a criminal court does not show that he knows that the United States Constitution guarantees him the assistance of counsel. *United States ex rel. Nortner* v. *Hiatt*, 33 F. Supp. 545, 546 (M. D. Pa.). During and after the earlier trial he may not have learned anything of his constitutional rights. In that earlier trial (as in the later trial) his rights may have been infringed without his being aware of the infringement: that is, he may have had no counsel and no knowledge (then or later) of his right to have counsel assigned. Or he may *then* have been able to pay for counsel and not known that, if he were indigent, he would have a

right to have counsel assigned to him without cost to him. Neither of those possibilities is foreclosed by the record in the case at bar.

Nor is there any justification for distinguishing this case from *Johnson's* case on the ground that here the petitioner pleaded guilty while there he pleaded not guilty.

There is no intimation in this Court's opinion in *Johnson* v. *Zerbst* that that case in any way turned upon the particular type of plea which had been made by the petitioner. In fact, the intimation is directly the other way. Mr. Justice Black's opinion (304 U. S. 463), like the earlier opinion of Mr. Justice Sutherland in *Powell* v. *Alabama,* 287 U. S. 45, 69, makes it plain that a person charged with a serious crime is entitled to the assistance of counsel at "*every* step in the proceedings against him." And both opinions place particular emphasis upon the point that a layman needs a lawyer to determine "whether the indictment is good or bad." It follows that a prisoner is entitled to the assistance of counsel at the arraignment and a reasonable time before that event [5] to aid him in scrutinizing the indictment and to aid him in pleading.

Moreover, any suggestion that the doctrine of *Johnson* v. *Zerbst* was limited to persons who pleaded not guilty cannot stand in the light of what this Court, with the consent of the present Solicitor General, did last term in *Frame* v. *Hudspeth,* 309 U. S. 698. In that case the petitioner alleged that he had pleaded guilty without being given the assistance of counsel and when he was mentally incompetent to waive his right to counsel. Although the District Court denied the writ of habeas corpus for which the petitioner had applied, and although the Circuit Court

[5] In *Powell* v. *Alabama,* 287 U. S. 45, 71, the Court held that "it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by the assignment *at such time* or under such circumstances *as to preclude the giving of effective aid in the preparation and trial of* the case." (Italics added.)

of Appeals affirmed, this Court reversed and remanded the cause "to the District Court for the purpose of making a full inquiry into the mental status of the petitioner at the time he entered the plea of guilty." See also *Levine* v. *Hudspeth,* 102 F. (2d) 691 (C. C. C. A. 10); *Mothershead* v. *King,* 112 F. (2d) 1004 (C. C. A. 8); *Howard* v. *Dowd,* 25 F. Supp. 844, 845 (N. D. Ind.); *Erwin* v. *Sanford,* 27 F. Supp. 892 (N. D. Ga.).

In view of *Frame's* case and the lower court cases just cited, it seems unnecessary to elaborate the point that the doctrine of *Johnson* v. *Zerbst* applies to a person who pleaded guilty without competently waiving his right to assistance of counsel. Any other conclusion would be shocking, particularly since in about three-fourths of all federal criminal cases the accused pleads guilty.[6] It would allow the Government in all those cases to do what the Government virtually admits that the United States District Attorney did here: to isolate an indigent prisoner until the prosecutor obtained from him, either by fear or improper bargains or misunderstanding, a plea of guilty and then, after counsel would be almost useless, to tell the prisoner he might go through the ceremonial rite of having counsel present when the sentence was imposed. Furthermore, it would overlook the great importance of arraignment and pleading which has been regarded as a cornerstone of our criminal procedure by this Court (Cf. *Crain* v. *United States,* 162 U. S. 625, 636-646) as well as generally [see National Commission on Law Observance and Enforcement (popularly called the Wickersham Commission), *Report on Lawlessness in Law Enforcement,* Vol. IV, pp. 281, 5, 7; American Law Institute, *Code of Criminal Procedure,* Sec. 203 and State statutes cited pp. 630-634.]

Ex majore cautela, we add that in testing the application (i. e., the pleading) in the case at bar to see whether it states

[6] Annual Report of the Director of the Administrative Office of the United States Courts, Sept. 16, 1940, pp. 78-86.

a *prima facie* case within the rule laid down in *Johnson* v. *Zerbst*, it is of no significance whether (as held in *Johnson* v. *Zerbst*) the petitioner cannot secure his final discharge unless he bears the burden of proving the facts he alleges and until the District Court finds on full inquiry that he did not waive his right to the assistance of counsel. The Ninth and Tenth Circuits to the contrary notwithstanding, burden of proof has nothing to do with the demurrability of a petition for a writ of habeas corpus.

E. Historical Background of the Sixth Amendment

In our view, as explained in the preceding subdivision of this brief, the petitioner should prevail if he merely rested his case upon the precedents in this Court. All the recent cases support our contention that the due process clauses [7] and the assistance of counsel clause guarantee that in a criminal prosecution the defendant, unless he competently waives the right to counsel, shall be informed that he is entitled to counsel selected by himself or, if he is indigent, selected and assigned by the court.

But we need not rest on recent precedent alone. Our contention is buttressed by the constitutional history of the Sixth Amendment.

After the Constitutional Convention adjourned at Philadelphia, September 17, 1787, the Constitution as it then stood without any Bill of Rights was considered by specially convoked conventions in the separate States. In many of the States it became apparent that ratification could not be secured except upon the condition that steps should be taken immediately after the national government was

[7] In the preceding subdivision chief emphasis was placed upon *Johnson* v. *Zerbst*. However, reliance was also placed upon *Powell* v. *Alabama*, which, though dealing specifically with the due process clause of the Fourteenth Amendment, aids in the interpretation of the parallel due process clause of the Fifth Amendment.

formed to add to the Constitution a Bill of Rights. Charles Warren, *The Making of The Constitution,* p. 510.

In discussing Bills of Rights at the State conventions held in Massachusetts,[8] New Hampshire,[9] Maryland,[10] Virginia,[11] Pennsylvania [12] and North Carolina [13] special emphasis was placed on criminal procedure. As the references just made in the margin indicate, each of those states considered (and, with the exception of Maryland and Pennsylvania, adopted) particular provisions to safeguard the rights of an accused in a criminal proceeding brought by the United States. Our interest in the case at bar is particularly in the Virginia and Pennsylvania conventions, for it was in the Bills of Rights presented to those assemblies that reference was made to provision for assistance of counsel.

Before turning to the actual proposals from Virginia and Pennsylvania, however, it is important to have in mind exactly what the text of Blackstone's *Commentaries,* then current [14] in the colonies, said was (and in fact what actually was) the law of England as to the right of counsel in criminal cases. It is well enough known [15] that Blackstone had correctly stated and criticised the English common law rule

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[8] *Memoir of Theophilus Parsons;* by his son, Theophilus Parsons (Boston 1859), pp. 70, 79; *Debates and Proceedings in the Convention of the Commonwealth of Massachusetts held in the year 1788* (Boston 1856), pp. 80, 84, 87-92; Elliot's *Debates on the Federal Constitution* (1861), Vol. II, p. 177.

[9] Joseph B. Walker, *A History of the New Hampshire Convention* (Boston 1888), p. 50.

[10] Elliot's *Debates,* Vol. II, pp. 550, 555.

[11] *Ibid.,* Vol. III, p. 658; Kate Mason Howland, *The Life of George Mason* (N. Y. 1892), Vol. II, pp. 444, 446.

[12] J. B. McMaster and F. D. Stone, *Pennsylvania and the Federal Convention* (1888) pp. 421, 461.

[13] Elliot's *Debates,* Vol. IV, pp. 243-251.

[14] The quotations from Blackstone have been checked against John Adams' personal copy of Blackstone now in the Adams collection of the Boston Public Library.

[15] See *Powell* v. *Alabama,* 287 U. S. 45.

that in a trial for a capital crime the prisoner was not entitled to counsel except upon a point of law.[16] But it seems hitherto to have escaped attention that on the next page [17] Blackstone cites and quotes from the English Treason Act of 1695.[18] By contrast with the common law, that statute gave a person indicted for treason a right to consult

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[16] Blackstone, *Commentaries,* Book IV, p. 355, states:

"But it is a settled rule at common law, that no counsel shall be allowed to a prisoner, upon his trial upon the general issue in any capital crime, unless some point of law shall arise proper to be debated. A rule, which • • • seems to be not at all of a piece with the rest of the humane treatment of prisoners by the English law."

[17] Blackstone, *Commentaries,* Book IV, p. 356, states:

"By statute 7 W III c. 3 • • • persons indicted for such high treason, as works a corruption of the blood or misprision thereof, (except treason in counterfeiting the king's coin or seals) may make their full defence by counsel, not exceeding two, to be named by the prisoner, and assigned by the court or judge."

[18] The Treason Act, 1695 (7 and 8 Will. III, c. 3) § 1 [reprinted IV Halsbury's *Statutes of England,* pp. 328-329] provides:

"From and after the five and twentieth day of March in the yeare [sic] of our Lord one thousand six hundred ninety six all and every person and persons whatsoever that shall bee [sic] accused and indicted for high treason whereby any corruption of blood may or shall bee [sic] made to any such offender or offenders or for misprision of such treason shall have a true copy of the whole indictment delivered unto them or any of them *five days* att [sic] the least *before he or they shall be tried* for the same *whereby to enable them* and any of them respectively *to advise with counsell* [sic] *thereupon to plead* and make their defence his or their attorney or attorneys agent or agents or any of them requiring the same and paying the officer his reasonable fees for writing thereof not exceeding five shillings for the copy of every such indictment. And that *every person* soe [sic] accused and indicted *arraigned* or tryed [sic] *shall bee* [sic] received and *admitted to make* his and their full *defence by counsel* learned in the law and to make any proof that hee [sic] or they can produce by lawful witnesse [sic] or witnesses who shall then be upon oath for his and their just defence in that behalfe [sic]. And *in case any person* or persons so accused or indicted *shall desire counsel the court* before whom such person or persons shall bee [sic] tryed [sic] or some judge of that court shall and *is* hereby authorised and *required immediately* upon his or their request *to assign to such person* and persons such and soe [sic] many *counsel* not exceeding two as the person or persons shall desire to whom such counsel shall have free accesse [sic] at all seasonable houres [sic] any law or usage to the contrary notwithstanding." (Italics added.)

counsel before he pleaded as well as at the arraignment and trial; and in case any person indicted had no counsel the court was required to assign to such person counsel on his behalf.

The significance of this passage from Blackstone and the cited statute is immediately apparent when we turn to the proceedings in the Pennsylvania Convention. The leaders of that Convention, Wilson, Whitehill, Smilie and Findley,[19] were not merely aware of Blackstone, they actually carried copies of the *Commentaries* to the Convention floor [20] to aid them in debate. Thus when at the end of the session the minority proposed that in criminal prosecutions the accused has a right to be heard by himself and his counsel [21] they probably meant that the English practice with respect to ordinary capital crimes should not be followed, but that instead the English practice with respect to treason trials should be followed and counsel should be assigned by the courts to aid necessitous defendants both in pleading and in trial.

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[19] J. B. McMaster and F. D. Stone, *Pennsylvania and the Federal Convention* (1888), pp. 229, 360, 406.

[20] *Ibid.*, p. 406 (December 11, 1787); see also Elliot's *Debates*, Vol. II, p. 513.

[21] *Ibid.*, pp. 454, 461, gives the following text from "The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents":

"3. That in all capital and criminal prosecutions, a man has a right to demand the cause and nature of his accusation, as well in the federal courts as in those of the several States; *to be heard by himself and his counsel;* to be confronted with the accusers and witnesses; to call for evidence in his favor, and a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to give evidence against himself; and that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." (Italics added.)

Note, however, that the text as set forth at p. 421 uses the phrase "to be heard by himself *or* his counsel." Also it states "the vicinage" instead of "his vicinage."

The Virginia Convention, though less clear in its reference to Blackstone, also suggests a deliberate concern over assistance of counsel. The drafting of the Bill of Rights in Virginia was in the hands of George Mason,[22] who had inserted in his pioneer 1776 draft of the Virginia Declaration of Rights important safeguards in criminal proceedings but had omitted to provide for assistance of counsel.[23] Mason apparently became aware of the defect, for when he was appointed to draw the proposed Virginia Bill of Rights he included as a suggested Eighth Article[24] the following provision:

> "8th. That in all capital or criminal prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and to be *admitted counsel in his favor*, and to a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty (except in the government of the land and naval forces in time of actual war, invasion or rebellion;) nor can he be compelled to give evidence against himself."

We cannot now tell exactly what Mason meant by the phrase "to be *admitted* counsel in his favor." Perhaps he meant nothing more than the accused should be *permitted* counsel, although the phrase in the eighteenth century lent itself equally well to an interpretation that the accused shall be *granted*[25] counsel in his favor. Whatever Mason may have meant, the Convention as a whole (perhaps affected by Blackstone) was not satisfied with his wording.

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[22] K. M. Howland, *Life of George Mason, supra,* Vol. II, pp. 444, 446. See also John Adams Diary for June 23, 1779, reprinted C. F. Adams, *Works of John Adams* (Boston 1851), Vol. III, p. 220.

[23] K. M. Howland, *Life of George Mason, supra,* Vol. I, pp. 229, 237, 240, 437, 440.

[24] *Ibid.,* Vol. II, pp. 444, 446.

[25] See Oxford English Dictionary, Vol. I, p. 121, under "Admit," meaning I, 2, a.

It changed Mason's phrase from a provision that the accused should be "*admitted* counsel in his favor" to a provision that he should be "*allowed* counsel in his favor." With this change [26] the Virginia proposal was adopted [27] in the following form:

> "8th. That, in all criminal and capital prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and to a fair and speedy trial by an impartial [illegible] of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces;) nor can he be compelled to give evidence against himself."

The phrase "be allowed counsel" here seems to mean to be assigned counsel as one's right under the law or as appropriate to his needs.[28]

The Virginia, Pennsylvania and other proposals for a Federal Bill of Rights came before the First Congress. We do not, of course, have a complete transcript of the proceedings. But, from correspondence and other sources, we can fairly gauge the atmosphere in which the debates occurred. One important element that we know affected Congressional consideration of the Bill of Rights was the history of the various State conventions just described. Another element was the influence of French ideas upon Americans and of American ideas upon Frenchmen. Thomas Jefferson had written from Paris about the progress and text of the French Declaration of Rights to Thomas Paine, July 11, 1789,[29] to John Jay, July 19, 1789 [30]

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[26] There are a few other insignificant changes.

[27] Elliot's *Debates,* Vol. III, p. 658.

[28] See Oxford English Dictionary, Vol. I, p. 239, under "Allow," meaning IV, 11 and 12.

[29] *Writings of Thomas Jefferson* (ed. H. A. Washington, Philadelphia 1871), Vol. III, p. 69.

[30] *Ibid.,* Vol. III, p. 72.

and to James Madison, August 28, 1789.[31] We do not know what other French correspondents may have sent, but from the letters just cited we do know Jefferson sent copies of drafts of the proposed French Declaration of Rights and it would be only natural if reference were also made by Jefferson or other correspondents to the contemporary "cahiers" or instructions given by the different French constituencies to their delegates assembled at the Etats-Généraux to draw up a Declaration of the Rights of Man. Among those instructions we now know[32] there was one from La Rochelle which said "Let counsel be assigned to the accused in all cases and from the beginning of the examination."[33] And from Paris and Vannes came the suggestion that "a judicial defender shall be assigned him from the beginning of the criminal action."[34]

Whether these particular cahiers were or were not known on this side of the Atlantic, it is clear that that part of the Sixth Amendment which guarantees the accused in criminal prosecutions "the assistance of counsel" was not inserted in the Bill of Rights thoughtlessly by an inattentive Congress. The phrase was used in the draft Bill of Rights proposed by James Madison, June 8, 1789 [1 Annals of Congress, p. 435] which after some changes in committee and on the floor [1 Annals of Congress 756] passed the House of Representatives August 21, 1789 [1 Annals of Congress 767; 1 House Journal 85]. But it appears to have been deleted in the version which passed the Senate September 9, 1789 [1 Senate Journal 77; 1 Annals of Con-

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[31] *Ibid.*, Vol. III, p. 96. See the effect of this letter on Madison, *Writings of James Madison* (Philadelphia 1865), Vol. 1, p. 492, Letter to E. Pendleton, Sept. 23, 1789.

[32] A. Esmein, *A History of Continental Criminal Procedure* (translated by John Simpson, Boston 1913), p. 398.

[33] La Rochelle, Cahier du Tiers, III, 161.

[34] City of Paris, Cahier du Clergé, I, 159; Vannes, Cahier du Tiers, III, 161-162.

gress 77]. The House on September 24th insisted on including the phrase [1 Annals of Congress 913; 1 House Journal 121; 1 Senate Journal 87]; and the next day the Senate yielded [1 Senate Journal 88]. Thus the provision was a deliberate choice made against a background of convention debate, international discussion and above all law-book learning regarding English procedure in treason trials, all of which make it highly probable that what was intended was that in a criminal prosecution the accused should have from the beginning of the proceedings counsel selected by him, or if he were indigent, assigned by the court to aid him in pleading. To carry out this intention Congress used an apt expression. The phrase "assistance of counsel" would normally [35] mean "the help afforded by counsel." And the phrase "enjoy the right" would normally mean that the accused would actually possess, use or experience the right.[36]

Thus, the historical background of the Sixth Amendment no less than the decisions of this Court support our contention that the Constitution is violated when a person is arraigned on a serious criminal charge without being offered the assistance of counsel.

F. Modern Authorities Generally Support the Right of An Accused to Counsel Prior to Arraignment.

In addition to precedents in this Court and the historical background of the Sixth Amendment, we rely to some extent upon a rule of criminal procedure so widely adopted by modern authorities that it "reflects if it does not estab-

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[35] See Oxford English Dictionary, Vol. I, p. 511, under "Assistance," meaning III. Note that meaning I apparently became obsolete in the 17th Century, as the word when used in that sense thereafter is placed in quotation marks.

[36] See Oxford English Dictionary, Vol. III, p. 188, under "Enjoy," meaning III.

lish, the right to have counsel appointed, at least in cases like the present." *Powell* v. *Alabama,* 287 U. S. 45, 73.

Perhaps the clearest statement of the modern rule is to be found in the American Law Institute *Code of Criminal Procedure,* Official Draft March 16, 1931, which provides as follows:

> "Section 203. Before the defendant is arraigned on a charge of felony if he is without counsel the court shall, unless the defendant objects, assign him counsel to represent him in the cause. Counsel so assigned shall serve without cost to the defendant, and shall have free access to the defendant, in private, at all reasonable hours while acting as counsel for him. Assignment of counsel shall not deprive the defendant of the right to engage other counsel at any stage of the proceedings in substitution of counsel assigned him by the court. Failure to assign counsel before arraignment shall not affect the validity of any proceeding in the cause, if it appear that the defendant was subsequently represented by counsel whether assigned to him or of his own choosing and that the defendant was not in fact prejudiced by such failure."

This statement of the modern rule is not an academic invention but is buttressed by the citation of constitutional or statutory provisions in almost every state in the Union.[37]

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[37] American Law Institute, *Code of Criminal Procedure,* Official Draft March 16, 1931, pp. 630-634. See also the list of state constitutional provisions guaranteeing assistance of counsel set out in the *Index Digest of State Constitutions* (New York, 1915).

[38] California Penal Code § 987 provides:

"If the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have counsel before being arraigned, and must be asked if he desires the aid of counsel. If he desires and is unable to employ counsel, the court must assign counsel to defend him."

Without attempting to set forth *in extenso* all these provisions, it will be sufficient to quote in the margin typical statutory provisions from California [38] and New York.[39]

In the light of these constitutional and statutory provisions the prevailing opinion [40] in American State courts today is that the accused is entitled to the assistance of counsel at every stage of a criminal prosecution and that it is error to compel him to plead in the absence of counsel. However, we admit that there are some State courts which have taken the view that the accused is entitled to the assistance of counsel only if he pleads not guilty and goes to trial,[41] and that there are other State courts which have denied that under any circumstances there is a constitu-

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[39] New York Criminal Code § 188 provides:

"When the defendant is brought before a magistrate upon an arrest either with or without warrant on a charge of having committed a crime, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and before any further proceedings are had."

New York Code of Criminal Procedure § 308 provides:

"If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does the court must assign counsel."

See interpretation of this statute in *People ex rel. Perry* v. *Berry,* 250 N. Y. 452, 454; *People* v. *Price,* 262 N. Y. 408, 413.

[40] *People* v. *Naphthaly,* 105 Cal. 641, 39 Pac. 29; *Batchelor* v. *State,* 189 Ind. 69, 125 N. E. 773; *State* v. *Moore,* 61 Kan. 732, 60 Pac. 748; *Ex parte Hollins,* 54 Okla. Crim. Rep. 70, 14 Pac. (2d) 243. The following cases indicate rather than hold that an accused has a constitutional right to the assistance of counsel before pleading: *State ex rel. Tucker* v. *Davis,* 9 Okla. Crim. Rep. 94, 130 Pac. 962; *Thomas* v. *Millis,* 117 Oh. St. 64, 157 N. E. 488. Cf. *Jackson* v. *Commonwealth,* 215 Ky. 800, 287 S. W. 17; *People* v. *Risley,* 66 How. Pr. (N. Y.) 67, 13 Abb. N. Cas. 186; *Hamilton* v. *State,* 68 Tex. Crim. 419, 153 S. W. 331; *State* v. *McNeal,* 304 Mo. 119, 262 S. W. 1025. See also *People* v. *Randazzio,* 194 N. Y. 147, 158, 87 N. E. 112. Among the law review collections of cases the best seem to be Note (1933) 17 Minn. L. Rev. 415; Note (1933) 19 Va. L. Rev. 293.

[41] *State* v. *Heyer,* 89 N. J. Law 187, 98 Atl. 413; *State* v. *Murphy,* 87 N. J. Law 515, 530, 94 Atl. 640.

tional right to have the court appoint counsel for an indigent prisoner.[42]

English law (which it will be recalled was slow to allow an accused to have counsel even if he could pay for him) is still somewhat behind American practice. Following study of the problem by a Royal Commission,[43] Parliament, while not absolutely requiring the assignment of free counsel for indigent prisoners, did authorize such assignment not merely for the conduct of a trial but also for its preparation.[44]

Supplementing this constitutional, statutory and case law, we cite in the margin as authority for the proposition that the proper practice is to assign counsel to an indigent prisoner prior to his plea certain miscellaneous authorities on criminal law.[45]

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[42] A recent survey of the state cases which take this view will be found in the Respondent's Brief, Appendix A, pp. 48-73, filed in *Johnson* v. *Zerbst*, 304 U. S. 458, October Term, 1937, No. 699.

[43] First Report of the Commission on Legal Aid for the Poor (1926) CMD 2638. Final Report of the Commission on Legal Aid for the Poor (1928) CMD 3016.

[44] *Poor Prisoners' Defense Act*, 1930, 20 and 21 Geo. V, c. 32. For the implementing regulations see Butterworth's *Twentieth Century Statutes*, Vol. 27, pp. 28-31 (1930); Vol. 28, pp. 117-118 (1931).

[45] National Commission on Law Observance and Enforcement (popularly known as the Wickersham Commission), *Report on Lawlessness in Law Enforcement*, Vol. IV, pp. 5, 7. See also the special Report annexed thereto at p. 263 et seq., prepared by Zechariah Chafee, Jr., Walter H. Pollak and Carl S. Stern, p. 281. Cf. *Criminal Justice in Cleveland* (a survey under the direction of Roscoe Pound and Felix Frankfurter (1922), p. 311; Raymond Moley, *Our Criminal Courts* (1930), p. 67; Pendleton Howard, *Criminal Justice in England* (1931), pp. 346-349; Reginald Heber Smith, *Justice and The Poor* (Carnegie Foundation for the Advancement of Teaching, 1919), pp. 111-112. See comment on *Powell* v. *Alabama*, 287 U. S. 45, in Felix Frankfurter, *Law and Politics*, "The Supreme Court Writes a Chapter on Man's Rights," p. 189. At p. 193 it is said that "Not only must there be a court free from coercion, but the accused must be *furnished* with means of presenting his defense. For this the assistance of counsel is essential. *Time for investigation* and for the production of evidence is imperative." (Italics added.) See also the

II.

Inasmuch as on its face petitioner's application states a case of unlawful imprisonment, the District Court (1) Erred in not issuing a writ of habeas corpus commanding the petitioner to be brought before the court, (2) Erred in not permitting a full, expeditious inquiry wherein the petitioner would have reasonable opportunity to present testimony in support of the application by usual methods such as examining and cross-examining witnesses and offering depositions, and (3) Erred in not finding the facts.

A. Construction of the District Court's Order.

In the case at bar the District Court entered an order denying the writ of habeas corpus (R. 25-26). From the ambiguous text [46] of the order it is possible to advance the view that the District Judge merely purported to consider the petitioner's pleadings (disregarding the respondent's

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recommendation of the *Report of the Judicial Conference*, October Session, 1940, p. 16, that provision should be made for the appointment of public defenders.

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[46] "In United States District Court

No. 22969-R

Jack Walker

vs.

James A. Johnston, Warden, U. S. Penitentiary, Alcatraz, California

Order Denying Petition for Writ of Habeas Corpus—July 10, 1939

The application for Writ of Habeas Corpus (by Order to Show Cause) came on this day to be heard. W. S. Johnston, Esq., appeared as Attorney for the Petitioner, and A. J. Zirpoli, Esq., Assistant United States Attorney, was present for the Respondent. After argument by the Attorneys, the application for a Writ of Habeas Corpus was submitted to the Court, and the Court being fully advised. It Is Ordered that said application be and the same is hereby denied, that the Order to Show Cause be discharged, and that the Petition for Writ of Habeas Corpus be and the same is hereby dismissed."

answer and annexed affidavits), and on that basis alone determined that no case for the issuance of the writ was stated. In support of this view is the fact that the District Court's order makes no reference to evidence or to the respondent's pleading and includes no specific findings. In other words, it may be that all that the Judge decided was that the application stated no cause of action. If so, then there can be no question that he erred and the proper course in the instant case is for this Court to reverse the Circuit Court of Appeals for the reasons stated in Point I of this brief.

But the limited view of the District Court's order suggested in the last paragraph does not appear to us to be sound. We believe that the court intended to deny and did deny the writ not on the narrow ground that he thought the pleading insufficient but on the ground that he considered the evidence and concluded it was against the petitioner. In support of that construction of the order are three factors: first, the District Court in this case did not dismiss the petition when filed, but instead issued a rule to show cause directing the Warden to file a return; second, the general practice in the Northern District of California (see cases cited in footnote 59, *infra*) is to try applications for habeas corpus in the same casual way that this record reveals; and third, the Ninth Circuit Court of Appeals construed the District Court's order as a combined determination of fact and of law (R. 33-34).

If, then, the true construction of the District Court's order is that it represents a determination of fact as well as of law, we submit that the court erroneously departed from the accepted, usual and essential course of judicial proceedings in habeas corpus cases. We contend that since the petitioner's application stated a cause of action the writ of habeas corpus should have issued, the petitioner

should have been brought before the court, and then there should have been a full inquiry affording the petitioner a reasonable opportunity to present testimony by usual methods such as examining and cross-examining witnesses and offering depositions.

B. Where an Application for a Writ of Habeas Corpus States on Its Face a Case of Unlawful Imprisonment, but the Facts Alleged in the Application are Challenged, the Court Must Issue the Writ, Hold a Hearing on Evidence and Find the Facts.

To avoid confusion, we emphasize that we are here concerned with a case in which (under our view) the application is good on its face as a matter of law and the only issue is whether the facts asserted in the application are true. This is not a case where the petition is bad on its face and should therefore be dismissed forthwith.[47] Nor is it a case where the petition raises a mere issue of law. If only a question of law had been raised, then the District Court would have been warranted not merely in issuing to the custodian a rule to show cause why the writ should not issue[48] but also, on the return to the order to show cause, if the decision on the point of law were adverse to the petitioner, in discharging the rule, denying the writ and dismissing the petition[49] [or, if the decision were favorable to the petitioner, in making the rule absolute and granting

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[47] R. S. § 755, U. S. C. Ti. 28 § 455; *Frank* v. *Mangum*, 237 U. S. 309, 322. See *Ex parte Milligan*, 4 Wall. 2, 110.

[48] *Ex parte Yarbrough*, 110 U. S. 651, 653; *Ex parte Royall*, 117 U. S. 241; *In re Medley*, 134 U. S. 160, 162-163; *Murdock* v. *Pollock*, 229 Fed. 392 (C. C. A. 8). See Halsbury's *Laws of England* (2d ed.), Vol. IX, ¶ 1236, p. 725; *Secretary of State for Home Affairs* v. *O'Brien* [1923], A. C. 603, 615.

[49] *Ex parte Yarbrough*, 110 U. S. 651; *Ex parte Royall*, 117 U. S. 241; *Murdock* v. *Pollock*, 229 Fed. 392.

the writ].[50] On the contrary, this is a case in which the ultimate issue is one of fact.

We contend that under these circumstances the court has two, and only two, choices. It may issue the writ immediately upon the filing of the application. Or it may first issue an order to show cause (which serves to close the pleadings and narrow the issues of fact) and then award the writ. The important principle is that where it appears that there is a disputed issue of fact, prior to the court making any determination of fact, the writ must issue and the petitioner must be brought before the court.

In support of our contention that where there are disputes of fact the prisoner must be brought before the court we rely upon the habeas corpus statutes, the view adopted in most of the Federal courts, the English practice and the paramount policy of preserving what a great legal historian has called "the most effectual protector of the liberty of the subject that any legal system has ever devised."[51]

The habeas corpus statutes speak simply and directly. Act of February 5, 1867, c. 28, 14 Stat. 385-386, as rephrased in R. S. § 755, U. S. C. Ti. 28 § 455, provides that "The court or justice to whom such application is made shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto." Act of February 5, 1867, c. 28, 14 Stat. 385, 386, as rephrased in R. S. § 758, U. S. C. Ti. 28 § 458, provides that "The person making the return shall at the same time bring the body of the party before the judge who granted the writ."

So far as we are aware, in cases where there was a dispute as to the facts this Court has never sanctioned any

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[50] *In re Medley*, 134 U. S. 160. See also this Court's order in *Ex parte Milligan*, apparently reported only at 18 L. Ed. U. S. Sup. Ct. 291. *Secretary of State for Home Affairs* v. *O'Brien* [1923] A. C. 603.

[51] Holdsworth, *History of English Law*, Vol. X, p. 658.

practice other than to issue the writ and bring the petitioner before the trial court for a full judicial inquiry.[52]

The inferior Federal courts show a diversity of opinion. The practice of bringing in the petitioner (which we believe is the only correct practice) has been generally followed in the First Circuit,[53] the Fourth Circuit,[54] the Fifth Circuit,[55] the Eighth Circuit,[56] the Court of Appeals for the District of Columbia[57] and the Middle District of Pennsylvania.[58] A contrary practice of refusing to bring the prisoner into court has been followed, with few exceptions, by the Ninth[59] and Tenth[60] Circuits and occasionally elsewhere.[61]

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[52] Observe the orders, as well as the opinions, of this Court in *Ng Fung Ho* v. *White*, 259 U. S. 276, 285, and *Chin Yow* v. *United States*, 208 U. S. 8, 13.

[53] *Wilson* v. *Lanagan*, 19 F. Supp. 870 (D. Mass.) s. c. 99 F. (2d) 544, 546 (C. C. A. 1).

[54] *Cundiff* v. *Nicholson*, 107 F. (2d) 162 (C. C. A. 4).

[55] *Farnsworth* v. *Zerbst*, 97 F. (2d) 255 (C. C. A. 5); *Irvin* v. *Zerbst*, 97 F. (2d) 257 (C. C. A. 5); *Hurt* v. *Zerbst*, 97 F. (2d) 519 (C. C. A. 5); *Brown* v. *Zerbst*, 99 F. (2d) 745 (C. C. A. 5); *Thomas* v. *Sanford*, 103 F. (2d) 887 (C. C. A. 5); *Erwin* v. *Sanford*, 27 F. Supp. 892 (N. D. Ga.).

[56] *Mothershead* v. *King*, 112 F. (2d) 1004 (C. C. A. 8).

[57] *Sanders* v. *Allen*, 100 F. (2d) 717, 719-720 (App. D. C.); *Clawans* v. *Rives*, 104 F. (2d) 240, 245 (App. D. C.).

[58] *United States ex rel. Nortner* v. *Hiatt*, 33 F. Supp. 545 (M. D. Pa.).

[59] *Harpin* v. *Johnston*, 109 F. (2d) 434 (C. C. A. 9); *Cooke* v. *Swope*, 28 F. Supp. 492 (W. D. Wash.) s. c. 109 F. (2d) 955 (C. C. A. 9); *Franzen* v. *Johnston*, 111 F. (2d) 817 (C. C. A. 9); *Walker* v. *Chitty*, 112 F. (2d) 79 (C. C. A. 9). Contra: *Hall* v. *Johnston*, 103 F. (2d) 900 (C. C. A. 9).

[60] *Zahn* v. *Hudspeth*, 102 F. (2d) 759 (C. C. A. 10); *Nivens* v. *Hudspeth*, 105 F. (2d) 756 (C. C. A. 10); *McCoy* v. *Hudspeth*, 106 F. (2d) 810 (C. C. A. 10); *Wilson* v. *Hudspeth*, 106 F. (2d) 812 (C. C. A. 10); *McDonald* v. *Hudspeth*, 108 F. (2d) 943 (C. C. A. 10); *Frame* v. *Hudspeth*, 109 F. (2d) 356 (C. C. A. 10), rev'd. 309 U. S. 698; *Moore* v. *Hudspeth*, 110 F. (2d) 386 (C. C. A. 10); *Creel* v. *Hudspeth*, 110 F. (2d) 762 (C. C. A. 10); *Pers* v. *Hudspeth*, 110 F. (2d) 812 (C. C. A. 10); *Blood* v. *Hudspeth*, 113 F. (2d) 470, 472 (C. C. A. 10); *Taylor* v. *Hudspeth*, 113 F. (2d) 825, 826 (C. C. A. 10); *Bugg* v. *Hudspeth*, 113 F. (2d) 260 (C. C. A. 10). Contra: *Levine* v. *Hudspeth*, 102 F. (2d) 691 (C. C. A. 10); *Buckner* v. *Hudspeth*, 105 F. (2d) 396 (C. C. A. 10).

[61] *United States ex rel. Lesser* v. *People of the State of New York*, 34 F. Supp. 730, 733 (W. D. N. Y.). [The point, however, seems not to have been pressed.]

In England it is settled that when, through a rule to show cause or otherwise, the court learns that the right of the petitioner ultimately to be discharged from custody turns on a question of fact, the court "has no jurisdiction to make a final order"[62] until it has awarded the writ and brought the petitioner before the court,[63] or in exceptional cases before a master specially appointed to find the facts.[64]

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[62] Halsbury's Laws of England (2d ed.) Vol. IX p. 726 note (t).

[63] *Re Bussell Infants,* 63 Solicitors Journal 835 (1919) Mr. Bussell applied by summons supported by an affidavit for a writ of habeas corpus *ad subjiciendum* to secure the release of his children from the custody of their mother. The affidavit set out that the mother was not a fit and proper person to have their absolute control because she was likely to neglect their education. Mrs. Bussell filed an affidavit denying the allegations of her husband. "Upon the hearing of the summons, Roche J. ordered (*inter alia*) that the respondent [husband] should have the custody of the children.' The wife appealed on the ground that there was no jurisdiction on the hearing of a summons to make an order as if a return to the writ had been made. The facts being in dispute, the only competent order was one directing a writ to issue. * * * The Earl of Reading, C. J. [on appeal] said that the order appealed from could not stand, for it was an order finally determining the custody of the children made on disputed facts, and therefore without jurisdiction. They had not, any more than the learned judge had, sufficient facts before them to decide the point * * * the order of the learned judge should be rescinded, and a writ of habeas corpus issued instead to bring the two children up before him in chambers, when the facts could be dealt with, and he could form a proper conclusion upon all the facts."

[64] *Case of the Hottentot Venus,* 13 East 195, 104 Eng. Rep. 344 (K. B. 1810). It appeared that "A female native of South Africa, remarkable for the formation of her person, was exhibited in London in the course of the autumn of this year under the name of the Hottentot Venus * * * by certain persons who had the apparent custody of her, and who received money for such exhibition. * * * From some expressions which had been uttered by those who had brought her over to this country, and with whom she continued, and some apparent indications of reluctance on her part during her exhibition, there was reason to believe, and affidavits were accordingly laid before the Court to that effect by the secretary of a society, denominated the African Institution, that she was brought to * * * [England] and since kept in custody and exhibited * * * against her consent."

The Court issued a rule nisi to show cause why a writ of habeas corpus should not issue. It also ordered that two persons named by the coroner

We submit that the practice dictated by the statute and observed in most of the United States courts and in England is sound. In every habeas corpus proceeding there is at stake the precious right of liberty of the person. Often that right turns on legal subtleties, and then there may be no advantage in bringing the petitioner before the court. But when the question is one of fact, the case will usually turn on whether the petitioner or another is telling the truth. To decide that question without sending for the prisoner does not satisfy elementary standards of fair play. It would be absurd to say that the petitioner may be adequately heard through pleadings, affidavits, briefs and counsel. No sophisticated person supposes that in a so-called "hearing" based on documents a convicted prisoner has a substantial chance of overcoming the evidence of the affidavits of judges and prosecuting officials. The prisoner's only hope of being believed by a judge is to be in court in person and while there to persuade by the inherent probability of the story he tells and by his demeanor and sincerity under examination.

Against these obvious considerations of justice, the respondent in the case at bar may urge (a) that it would be inconvenient to bring prisoners to the bar in every habeas corpus proceeding where there is an issue of fact, or (b) that R. S. § 761, U. S. C. Ti. 28 § 461, makes it unnecessary to issue the writ, or (c) that in this case the procedural

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and attorney should examine the South African in the absence of her custodians.

"Such examination took place accordingly before the coroner and attorney of the Court who made his report thereof; from whence it satisfactorily appeared to the Court that the woman came over here, and was exhibited, by her own consent."

The Court thereupon discharged the rule.

It is worth noting that the practice of appointing a master before whom the prisoner can appear is not unknown in the courts of the United States. Ex parte Sharp, 33 F. Supp. 464, 465 (D. Kan.).

point has not been seasonably and properly invoked. If these objections are presented, they are without merit.

The objection that it is inconvenient for the warden to bring prisoners before the court appears in the opinion of the Circuit Court of Appeals for the Ninth Circuit in this case (R. 33-34). We somewhat doubt whether the alleged inconvenience is so great as is supposed. Judge Underwood, sitting alone in the Northern District of Georgia where the United States Penitentiary at Atlanta is located, has not found it impossible to handle petitions for habeas corpus by awarding the writ and inquiring into the facts on a full hearing. See cases cited in footnote 55, *supra*. But even if the inconvenience were so great as is asserted, justice is not a mere matter of convenience. Most persons who are called to interrupt their regular work to respond to summons, petitions, declarations, complaints, miscellaneous pleadings or official inquiries, do not find it convenient to respond and produce. "Lawsuits also often prove to have been groundless, but no way has been discovered of relieving a defendant from the necessity of trial to establish the facts." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 51-52.

An objection based on R. S. § 761, U. S. C. Ti. 28, § 461, also is unavailing. The objection ignores the words of the section, its context in the statute of which it was originally a part and the English statute upon which the section is based.

R. S. § 761 provides that "The Court, or justice, or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." In that section there is no *express* direction as to whether to bring the petitioner to court or leave him in custody. But there is an obvious *implied* direction to bring

him into court inasmuch as the statute commands the judge to proceed "by hearing the testimony." The word "summary" does not warrant a contrary inference. As here used it means with "promptness," as this Court said in *Storti* v. *Massachusetts*, 183 U. S. 138, 143.[65]

The natural reading of the section as it now stands is reenforced by its legislative history. It was enacted as a part of the Act of February 5, 1867, c. 28, 14 Stat. 385, 386. That act provided, first, that "the judge to whom * * * application shall be made shall forthwith award a writ of habeas corpus"; then, that "the person in whose custody the party is detained * * * shall make return of said writ and bring the party before the judge"; next, that "the petitioner may deny any of the material facts set forth in the return"; and thereafter, that the "judge shall proceed in a summary way to determine the facts of the case by hearing testimony * * *" etc. Thus the context of R. S. § 761 makes it clear that the hearing therein provided was to follow upon, not to stand as an alternative for, the issuance of the writ of habeas corpus.

If any doubt could exist as to the proper construction of R. S. § 761, it is removed when it is realized that its text is obviously based upon and directed at the same evil as was the English Habeas Corpus Act of 1816, 56 Geo. III, c. 100, § 3 [reprinted in The Complete Statutes of England, Vol. V, pp. 95, 97]. At common law and under the Habeas Corpus Act of 1679, 31 Car. II, c. 2, the writ of habeas corpus was not framed or adapted to litigate facts. The writ was intended solely to test a question of law. Therefore if on an order to show cause a gaoler answered that he held under commitment of a court of competent jurisdiction, the inquiry was closed. The truth of the plea could

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[65] See Oxford English Dictionary, Vol. IX, p. 140, under "Summary" meaning III.

not be looked into.[66] The English Habeas Corpus Act of 1816 and the United States Habeas Corpus Act of 1867 changed that rule. They specifically provided for a *judicial inquiry* of the truth of the gaoler's answer.[67] And both the English prototype[68] and the American copy[69] have been interpreted to allow a full trial on every material matter not expressly contrary to the court record on which the commitment is based.

A final possible objection is that the right of the petitioner to be brought before the court was not seasonably invoked. We contend that it was drawn to the attention of the District Court by the petition itself (R. 4) as well as by argument of counsel; and that it was raised here by the petition for certiorari, pp. 4-5.

Even if the point were not made with artistry,[70] this Court has indicated that in a habeas corpus proceeding it will notice a plain and serious error although not properly assigned. *Mahler* v. *Eby*, 264 U. S. 32, 45; *Kessler* v.

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[66] Holdsworth, *History of English Law*, Vol. IX, pp. 119-120, quotes the following at p. 120, note 2, from the answers Chief Justice Wilmot gave to Parliament in 1751 when it was considering one of the bills which ultimately led to the Habeas Corpus Act of 1816:

"The Court says, 'Tell us the reason why you confine him.' The Court will determine whether it is a good or bad reason; but not whether it is a true or false one. The judges are not competent to this enquiry; it is not their province, but the province of a jury to determine it. * * * The writ is not framed or adapted to litigatory facts: it is a summary short way of taking the opinion of the Court upon a matter of law."

[67] *Johnson* v. *Zerbst*, 304 U. S. 458, 466; *Frank* v. *Mangum*, 237 U. S. 309, 330.

[68] *Re Turner* (1846), 15 L. J. (M. C.) 140. See Holdsworth, *supra*, p. 121.

[69] *Johnston* v. *Zerbst*, 304 U. S. 458, 466 note 18. *In re Mayfield*, 141 U. S. 107, 116.

[70] The tolerant attitude of this Court toward procedural irregularities by petitioners for habeas corpus has already been noted. See *Cox* v. *Hakes*, *supra*. See also Mr. Justice Holmes in *Chin Yow* v. *United States*, 208 U. S. 8, 11. "We do not scrutinize the allegations as if they were contained in a criminal indictment before the court upon a special demurrer."

Strecker, 307 U. S. 22, 34. Surely such notice is deserved in a situation where, under the English view, the District Court for the Northern District of California did not even have jurisdiction to act upon the petitioner's application without bringing him into court. *Re Bussell, Infants,* 63 Solicitors Journal 835. If, as Halsbury's *Laws of England* (2d ed.), Vol. IX, p. 726, note (t) asserts, the defect is truly jurisdictional, then this Court is not only free, but actually bound *sua sponte,* to notice the defect. *Clark* v. *Paul Gray,* 306 U. S. 583; *KVOS* v. *Associated Press,* 299 U. S. 269.

Since, in our view, because of the District Court's failure to issue the writ and call the petitioner to the bar the judgment below must in any event be reversed, it may, speaking strictly, be unnecessary for us to address our arguments to two additional questions: first, what type of evidence is admissible in the District Court after the writ has issued; and second, what form of judicial determination is requisite. However, although argument by us is unnecessary, we submit that directions by this Court would be salutary in the light of the deplorable practice now followed in the Ninth and Tenth Circuits where these issues are tried solely on affidavits and result in no explicit findings of fact by the District Courts. See footnotes 59 and 60, *supra.*

As to the type of evidence, we can find no valid reason for distinguishing this civil proceeding (see footnote 3, *supra*) from any other civil proceeding. The petitioner is entitled to a full judicial inquiry.[71] He has a statutory right to require the attendance of any witness living in the

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[71] *Moore* v. *Dempsey,* 261 U. S. 86, 92. See *Frame* v. *Hudspeth,* 309 U. S. 698; *Johnson* v. *Zerbst,* 304 U. S. 458, 469; *Ng Fung Ho* v. *White,* 259 U. S. 276, 285; *Frank* v. *Mangum,* 237 U. S. 309, 331, and Holmes, J., dissenting at p. 345; *Chin Yow* v. *United States,* 208 U. S. 8, 13; *Hurt* v. *Zerbst,* 97 F. (2d) 519 (C. C. A. 5); *Clawans* v. *Rives,* 104 F. (2d) 240, 245 (App. D. C.); *Mothershead* v. *King,* 112 F. (2d) 1004 (C. C. A. 8); *Wilson* v. *Lanagan,* 19 F. Supp. 870 (D. Mass.), aff'd. 99 F. (2d) 544, 546 (C. C. A. 1).

district or at a place not greater than one hundred miles from the place of holding court.[72] And he also has a right to take depositions in appropriate cases.[73] Such evidence will not interfere with the "summary" or expeditious nature of the proceedings. To be sure, as Bratton, C. J., has said, summons and depositions will interfere with the work of some of his brethren and some officials of the Department of Justice. [See *Blood* v. *Hudspeth*, 113 F. (2d) 470 (C. C. A. 10).] But judges are no more exempt from answering relevant questions in an appropriate inquiry than are business executives and cabinet officers. (*Morgan* v. *United States*, 298 U. S. 468, 482.) Courts exist to preserve the liberty of the litigant, not the liberty of the judge.

In connection with evidence questions, one difficult point which may arise is the right of either party to rely upon affidavits. Although the English Habeas Corpus Act of 1816, 56 Geo. III, c. 100, § 3, specifically provided for affidavits,[74] the American statute which in general copies the English statute does not so provide. It may, therefore, be inferred that Congress did not intend to allow proof by affidavit. At any rate, the impropriety of using affidavits in habeas corpus cases in this country has been vigorously stressed by former leaders of this bar,[75] so far as we know without disapproval of this Court. Moreover, whatever may have been the necessity for relying on affidavits before deposi-

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[72] Act of September 19, 1922, c. 344, 42 Stat. 848, U. S. C. Ti. 28 § 654. See also Rules of Civil Procedure, Rule 45(e).

[73] Rules of Civil Procedure, Rules 26-32, 45.

[74] Affidavits were used in *Ex parte Beeching*, 4 Barnewall & Creswell 136, 107 Eng. Rep. 1010. But where the issue of fact is acute it does not appear that this practice is followed. *Re Bussell, Infants*, 63 Solicitors Journal 835 (1919); *Re Turner* (1846), 15 L. J. (M. C.) 140.

[75] See argument of Joseph H. Choate, Esq., and James C. Carter, Esq., before this Court in *In re Neagle*, 135 U. S. 1, 23, 25. "The single question is to be fully tried, not upon affidavits, but upon testimony."

tions could be compelled, the need today has disappeared.[76] And, obviously, it is fairer and more likely to elicit the truth if distant persons are examined by both adversaries instead of *ex parte*.

As to the form which the District Court's determination should take, it is sufficient to refer to the oft-repeated admonition of this Court that when there is a question of fact at issue in a habeas corpus proceeding the trial court should make explicit findings of fact (*Johnson* v. *Zerbst*, 304 U. S. 458, *Moore* v. *Dempsey*, 261 U. S. 86, 92. See also *Frame* v. *Hudspeth*, 309 U. S. 698) and should not tell the clerk to enter an unsigned order as was done in the case at bar.

Conclusion.

For the foregoing reasons, the judgment of the Circuit Court of Appeals should be reversed; and the case should be remanded to the District Court with instructions that that court should issue a writ of habeas corpus *ad subjiciendum*, should afford petitioner a full opportunity to present evidence and should specifically find the facts.

Respectfully submitted,

CHARLES E. WYZANSKI, JR.

December 1940.

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[76] For the practice of taking depositions see *Irvin* v. *Zerbst*, 97 F. (2d) 257 (C. C. A. 5). Interrogatories were used in *Wilson* v. *Lanagan*, 19 F. Supp. 870 (D. Mass.), aff'd. 99 F.(2d) 544, 546 (C. C. A. 1). As *Irvin* v. *Zerbst* points out—since habeas corpus is not a criminal proceeding, confrontation is unnecessary.